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ISRAEL'S LAWS ON REFERENDUM: A TALE OF UNCONSTITUTIONAL LEGAL STRUCTURE

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I. INTRODUCTION

On November 28, 2010, the Law and Administration (Annulment of the Application of the Law, Jurisdiction and Administration) (Amendment) Law, 2010 (Referendum Law) was endorsed and published in *Reshumot* (the Official Governmental Journal) by the Israeli Parliament (Knesset), thus entered into force as a binding law.[1]

The law was enacted as an amendment to an earlier legislation called "The Law and Administration (Annulment of the Application of the Law, Jurisdiction and Administration) (Amendment) Law, 1999" (Golan Heights Entrenchment Law), which granted the executive branch in Israel the power to make decisions regarding the annulment of the law, jurisdiction, and administration of the State of Israel over the Golan Heights, together with its power to relinquish this area subject to a binding referendum, held in accordance with a Basic Law on referendum, to be enacted later on by the Knesset.[2] In other words, the Golan Heights Entrenchment Law was declaratory; thus calling upon the need to enshrine such referendum apparatus in a Basic Law enactment.

1. The Book of Laws, no. 2263 (Nov. 28, 2010).
2. The Book of Laws, no. 1703 (Feb. 9, 1999).

Despite of the Knesset's manifest declaration—as provided by the Golan Heights Entrenchment Law—for the need to a Basic Law legislation that normatively enshrines the referendum system as a binding law in Israel, at least regarding the application of the Israeli law, jurisdiction and administration over the Golan Heights—such constitutional legislation, has not come to exist.

Surprisingly however, instead of the enactment of a Basic Law—as provided in the Golan Heights Entrenchment Law—an ordinary legislation, in the shape of the Referendum Law was made, thus not only enshrining the concept of referendum in an ordinary law, but also providing a complete set of rules for the implementation of such referendum—rules that resemble the proceedings applicable in times of holding elections to the Knesset.

Remarkably, the Referendum Law does not limit its application to the saga surrounding the Golan Heights, but rather enlarges its scope to any area that is subject to the law, jurisdiction and administration of the State of Israel.[3] Namely, even though the law does not state it straight forward, the Golan Heights and East Jerusalem.

On December 13, 2010, I decided to challenge the constitutionality of the Referendum Law by submitting a petition to the Supreme Court of Israel, sitting as the High Court of Justice (HCJ or the Court), against the Knesset et al. (petition).[4] In principle, I argued that if a constitutional democracy is about to adopt a binding referendum system, then this must be done through a constitutional amendment and not an ordinary legislation. In addition, I asserted that the concept of binding referenda contradicts the basic and fundamental constitutional principles on which constitutional democracies stand; for it violates the required political, social, and legal balances that otherwise such democracies may strike, especially in the context of protecting the rights of minorities in multicultural societies.[5] In response to the petition, the respondents opposed to my arguments *per se*.[6]

During the first hearing session before the HCJ, on December 25, 2011, and following the Court's remarks, I agreed to limit the scope of the petition to the constitutional queries concerning the proper form of enactment for the Referendum Law, namely in a Basic Law, as distinguished from an ordinary law.[7] The idea behind making such a decision is that no actual referendum was at stake, and thus a problem of judicial review could have been emerged. At this stage, the Court urged the respondents to agree on the issuance of a decree *nisi*, thus addressing

3. Referendum Law, art. 3(1A)(a).
4. *See* HCJ 9149/10 (Isr.).
5. *Id.*
6. *Id.*
7. *Id.*

the petition substantively, but the latter refused. At the end of the day, the Court decided to hear the respondents' arguments against the issuance of a decree *nisi* in a larger panel of seven judges, instead of three, basically due to the important constitutional questions at stake.[8]

Accordingly, the respondents argued in depth before the HCJ during the second hearing session on November 20, 2012. Their basic argument was that although it is constitutionally preferable to enshrine the referendum system in a Basic Law legislation rather than an ordinary law, still it is not necessary.[9] In addition, the respondents asserted that even if I was right in my argument, the Court had no judicial power to intervene, thus declaring the Referendum Law void.[10] It was the respondents' contention that the Court's power for judicial review is limited in scope to extreme cases of unique circumstances that move heaven and earth. In their view, this was not the case in this particular petition. At this stage, the Court addressed the respondents again, seeking their consent to the issuance of a decree *nisi*, but the latter were not ready to make any concession. It was remarkable that during the long hearing at this session, the judicial panel did not approach me with even a single question.

On December 25, 2011, following the second hearing session, and despite the respondents' position, the HCJ issued a decree *nisi*, thus requiring the latter to address the petition substantively.[11]

A third hearing session before the HCJ, in which my arguments and the respondents' assertions were supposed to be discussed in depth, was scheduled for June 17, 2014. However, shortly before, on March 12, 2014, the Knesset enacted Basic Law: Referendum (Referendum Basic Law), which incorporated the referendum system, as a binding apparatus, in a Basic Law, thus leaving the details concerning the referendum's structure and its application valid as set forth in the Referendum Law.[12] Ironically, this happened at the time the petition was pending before the HCJ, where the respondents'—which included the Knesset and the Government—argued against the need for such Basic Law legislation.

In any case, and to this extent, the petition became irrelevant, for the legal remedy sought by submitting it before the HCJ was achieved, ultimately, by legislation. Accordingly, on May 13, 2014, the petition was withdrawn.

In this Article, I aim at discussing the question whether it was necessary to enact the Referendum Basic Law instead of, or in addition to, the Referendum Law in order for the Knesset to incorporate the referendum system as a binding mechanism in the Israeli law, or so

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. The Book of Laws, no. 2443 (Mar. 19, 2014).

preferable as argued by the Knesset and the Government before the HCJ. In addition, I purport to discuss the inadequacy of the referendum system to legal systems of constitutional democratic features, regardless of the question whether such a system was adopted by an ordinary legislation or enshrined in a constitutional amendment. It is worthwhile to remember that due to the Court's remarks, the latter argument was omitted from the petition and accordingly was not discussed at all before the Court.

In the first Part of the Article, I provide a broad normative survey of the entire legal infrastructure, in the light of which the constitutionality of the laws on referendum must be examined. Further, I examine the status of the substantive principle of the rule of law, as a binding normative legal principle and not merely as a declarative interpretive principle. Subsequently, I present the constitutional pillars upon which Israel's Basic Laws rely. In this connection, I also discuss the HCJ's power for judicial review, including the mandate to invalidate unconstitutional laws. This constitutional debate necessarily entails an examination of the constitutional mechanisms for amending Basic Laws in Israel and the way in which protected fundamental rights may be violated. This discussion in turn requires scrutinizing the primary concepts that underlie the most basic legal principles on which the legal regime in Israel is founded—both in terms of the civilian and political identity of the State, and in terms of the relationship between the central branches of the State (particularly, the legislative and executive branches), and the role of the People as the sovereign in this relationship.

In the second Part of the Article, I engage in a concrete legal debate regarding the constitutionality of the laws on referendum, led by the basic principles, as described in the first Part of this Article.

Finally, in the third Part, I summarize the issue by indicating the constitutional legal grounds that undermine the constitutionality of the laws on referendum. Ultimately, this constitutional scrutiny of the laws on referendum leads to one conclusion, namely, that these laws are unconstitutional, and, as such, are void *ab initio*. This conclusion results not only from the fact that the laws on referendum completely contradict the constitutional system in the State of Israel—in relation to the amendment of basic legislation—but also from their inherent contradiction to the substantive principle of the rule of law. As such, they afflict a fatal blow to the protected basic rights of its citizens in general and of the Arab citizens of Israel, as a national minority, in particular, all the more so Israel's Arab residents of the Golan Heights and East Jerusalem. Among the violated fundamental rights are: the right to vote, the right to be elected, the right to dignity and the right to equality. Thus, the laws on referendum undermine the extremely delicate political, legal, and constitutional balance on which the State of Israel was founded and in which light its legal tradition was developed.

In the following chapters, I intend to address the hereunder questions in depth:

(1) Does the Referendum Law contradict or violate the substantive principle of the rule of law?

(2) Whereas material modifications were initially effected through ordinary legislation, namely, the Referendum Law, rather than through basic legislation, does the Referendum Law materially modify substantive constitutional provisions under Basic Law: The Knesset and/or Basic Law: The Government and/or Basic Law: Jerusalem, Capital of Israel—otherwise than in accordance with accepted and binding judicial rulings in the Israeli legal system?

(3) Do the Referendum Basic Law and the Referendum Law (laws on referendum) violate fundamental rights, including the collective rights of the Arab minority in the State of Israel—all the more so Israel's Arab residents of the Golan Heights and East Jerusalem—protected by Basic Law: Human Dignity and Liberty, otherwise than in accordance with the provisions of the limitation clause enshrined in Section 8 of Basic Law: Human Dignity and Liberty?

(4) Do the laws on referendum violate fundamental rights, including the collective rights of the Arab minority in the State of Israel—all the more so Israel's Arab residents of the Golan Heights and East Jerusalem—protected by Basic Law: The Knesset, otherwise than in accordance with the judicial provisions of the limitation clause?

Before stepping forward, I would like to emphasize, that although this Article concerns solely with the Israeli case surrounding the referendum saga, it still stands on comparative and conceptual grounds, such that apply to every democracy, all the more so to constitutional democracies.

II. THE NORMATIVE FRAMEWORK

The laws on referendum test the Israeli legal system afresh. It poses a serious legal challenge to the legal system. In this Part of the Article, I will sketch the normative framework that shapes Israel's governmental and constitutional systems. In light of my conclusions herein, I will, in the next section, deal separately with the issue of the constitutionality of the laws on referendum. As I will explain in detail below, the initial enactment of the Referendum Law, and the legal position as provided by the respondents to the petition before the HCJ, draws us, to a large extent, back to the *United Mizrachi Bank Ltd* case (*Mizrachi Bank* case),[13] and

13. *See generally* CA 6821/93 United Mizrachi Bank Ltd. v. Migdal Cooperative Village, 49(4) PD 221 [1995] (Isr.), *available at* http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-bank-part-i. This is deemed as a touchstone case in the constitutional

reconsiders some of the judicial rulings and declarations made in that case.

A. *The (Formal and Substantive) Principle of the Rule of Law*

The rule of law, in its substantive sense, deals with the aspiration for governmental actions to comply with certain fundamental requirements. These requirements are intended to guarantee the internal morality of the law, which is critical to ensuring that the public feels committed to the law and complies with its provisions out of recognition of the law's binding validity. Safeguarding these principles allows the law to fulfill its mission as a social institution; the purpose of which is to enable human beings to live together, increase the public's sense of security and protect individual freedoms. Respect for the rule of law is essential to ensure the legitimacy of law enforcement among the members of the public who are subject to that law.[14]

In this context, I am not referring to the concept of "law" in its narrow sense (*Gesetz* in German, *loi* in French, *ley* in Spanish, and *law* in English), but rather to the term "Law" in a broader sense that even equates to "justice." Law is binding not because it has been enacted in a proper formal procedure by a duly elected legislature, but because it is just and proper (*Recht* in German, *droit* in French, and *derecho* in Spanish).[15]

The essence of this concept lies in the distinction between formal and substantive democracy. While formal democracy is only interested in the opinion of the majority and seeks to enforce the majority's decisions, whether these are good or bad, substantive democracy respects the opinion of the majority yet, at the same time, guarantees that minorities (weakened groups) are protected, particularly in circumstances where the majority misuses its powers to abuse these minorities. In this context, in another place I once wrote:

> The Athenian state had a constitution and a supreme court. Neither Socrates nor Plato criticized democracy as such. Socrates was inciting the aristocratic young men of Athens to revolt against the democracy of Athens, namely, against the rule of the majority. This is what captured Plato's mind in offering *The Republic*, the

legal history of the state of Israel, where the normative status of Israel's Basic Laws was discussed, as well as the HCJ's power on judicial review.

14. AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL: FUNDAMENTAL PRINCIPLES vol. 1, at 284–85 (2005) (in Hebrew).

15. MOHAMMED S. WATTAD, THE MEANING OF CRIMINAL LAW: THREE TENETS ON AMERICAN & COMPARATIVE CONSTITUTIONAL ASPECTS OF SUBSTANTIVE CRIMINAL LAW 124–25 (2007); RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 11 (1990); JOHN RAWLS, A THEORY OF JUSTICE (1971); IAN SHAPIRO, DEMOCRATIC JUSTICE (1999); NORBERTO BOBBIO, THE AGE OF RIGHTS (Allan Cameron trans., 1996); LOUIS HENKIN, THE AGE OF RIGHTS (1990).

> challenge of providing a true definition of justice, a philosophy of just and good society; for him, democracy is the rule of Law, namely, the rule of Good and Justice . . . While formal democracy is the rule of the majority, constitutional democracy considers the voice of the majority as another factor in determining what is fair and just, thus preventing any likelihood of abuse of minority rights (those whose interests are not protected by the majority). Formal democracy acts in accordance with the rule of the legislature, no matter how right, decent, just, and fair the legislature might be; what the legislature says the law is becomes binding law. Constitutional democracy scrutinizes the legislature's actions for their compatibility with the fundamental principles of fairness, reason, justice, and good. Finally, formal democracy represents the rule of law, but constitutional democracy is driven by the rule of Law. As Plato once argued against formal democracy, those who belong to the majority are concerned only with their own immediate pleasure and gratification, and therefore a democracy that relies on the rule of the majority cannot produce good human beings.[16]

The principle of the rule of law is counted, therefore, among the fundamental and central principles of any legal system, shaping the content and interpretation of the legal norms and often determining their validity. The fundamental principles are superior to ordinary legislative provisions.[17] This approach reflects the view that the constitution itself is not always paramount, as even the constitution is subject to these fundamental principles.[18] In this context, the remarks of Justice Aharon Barak in the matter of the *Laor Movement—One Heart and a New Spirit* are apt:

> In theory-principle, it is possible for a court in a democratic society to declare that a law, which violates fundamental principles of the system, is void; even if these fundamental principles are not anchored in a rigid constitution or in an entrenched Basic Law. There is nothing axiomatic in the approach that a law is not invalidated because of its content. The invalidation of a law by the court because it seriously infringes fundamental principles does not violate the principle of the sovereignty of the legislature, as

16. *See* WATTAD, *supra* note 15, at 196–98.

17. EA 1/65 Yardur v. Chairman of the Central Elections Committee of the Sixth Knesset 19(3) P.D. 365, 389 [1965] (Isr.).

18. SHMUEL SAADIA & LIAV ORGAD, REFERENDUM 123 (2000) (in Hebrew).

sovereignty is always limited.[19]

B. *Constitutional Characteristics of the Basic Laws*

Israel's Basic Laws were adopted in an atmosphere where it was intended to formulate supra legal constitutional norms. They certainly include elements characteristic of constitutions.[20] As such, through its rulings, the HCJ elevated these Basic Laws to a supreme normative status rising above that of other laws called "ordinary laws." Accordingly, when a legal norm in a Basic Law conflicts with another one of an ordinary law, the first will prevail and the latter yields.[21]

Most of the fundamental rights protected on the constitutional level are grouped within the provisions of Basic Law: Human Dignity and Liberty. Nonetheless, this Basic Law does not accord explicit protection to all utopian fundamental rights. Over the years, especially and particularly following the adoption of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, as well as the judgment in the *Mizrachi Bank* case[22]—but also earlier[23]—the HCJ enshrined some of the unprotected fundamental rights within the right to dignity. Among the rights which are not expressly protected one may find the right to freedom of expression and the right to equality.[24]

C. *The Force of Basic Laws as the Basis for Judicial Review*

> Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is

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19. HCJ 142/89 Laor Movement—One Heart and a New Spirit v. Knesset Speaker 44(3) P.D. 529, 555 [1989] (Isr.).

20. EITAN INBAR, CONSTITUTIONAL LAW AS REFLECTED IN JUDICIAL RULINGS 69 (2001) (in Hebrew).

21. RUBINSTEIN & MEDINA, *supra* note 14, at 98.

22. *Mizrachi Bank*, CA 6821/93.

23. *See generally* HCJ 355/79 Catalan v. Israel Prisons Service 34(3) PD 294 [1979] (Isr.); CA 294/91 Burial Society "Jerusalem Community" v. Kastenbaum 46(2) PD 464 [1991] (Isr.); HCJ 98/69 Bergman v. Minister of Finance 23(1) PD 693 [1969] (Isr.); HCJ 114/78 Burqan v. Minister of Finance 32(2) PD 800 [1978] (Isr.); HCJ 73/53 "Kol Ha'am" Ltd. v. Minister of the Interior 7 PD 871 [1953] (Isr.); HCJ 253/64 J'aris v. Haifa District Commissioner 18(4) PD 673 [1964] (Isr.); HCJ 1/49 Bejerano v. Minister of Police 2 PD 80 [1949] (Isr.); HCJ 337/81 Mitrani v. Minister of Transport 33(3) PD 337 [1981] (Isr.).

24. *Cf.* HCJ 5394/92 Hofert v. "Yad Vashem" Holocaust Martyrs and Heroes Remembrance Authority 48(3) PD 353 [1992] (Isr.); HCJ 4674/94 Mitral Ltd. v. The Knesset 50(5) PD 15 [1994] (Isr.); HCJ 5688/92 Weichselbaum v. Minister of Def. 47(2) PD 812 [1992] (Isr.); HCJ 3299/93 Weichselbaum v. Minister of Def. 49(2) PD 195 [1993] (Isr.); HCJ 4541/94 Miller v. Minister of Def. 49(4) PD 94 [1994] (Isr.); CA 4463/94 Golan v. Israel Prisons Serv. 50(4) PD 136 [1994] (Isr.); HCJ 4804/94 Station Film Ltd. v. Film & Play Review Bd. 50(5) PD 661 [1994] (Isr.).

> no abuse of power; but constant experience shows us that every man invested with power is apt to abuse it, and carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse, it is necessary, from the very nature of things that power should be a check to power.[25]

The HCJ, by virtue of the supra-legal constitutional authority vested in it by Section 15(c) of Basic Law: The Judiciary and, especially, following the judicial decisions rendered in the wake of the *Mizrachi Bank* case[26]—as well as in accordance with earlier case law,[27] has jurisdiction to consider and determine the legality of laws. The process of reviewing the legality of laws is essentially interpretive, where the task of interpretation is one of the chief powers wielded by the judiciary.[28]

There is no dispute as to the authority of the HCJ to interpret laws, Basic Laws, regulations and other legal norms. When the HCJ interprets an ordinary law in light of a Basic Law, which it is also authorized to interpret, and a conflict is discovered between the Basic Law and the ordinary law, that conflict essentially relates to the interpretation of the relevant laws.[29]

The ruling in the *Mizrachi Bank* case further strengthened the position of the HCJ in terms of its authority to review not only the legality of laws but also the constitutionality of laws.[30] A chief aspect of this latter authority is that it enables the Court to fulfill its mandate to maintain the rule of law.[31] After all, the primary function of the HCJ is to instill democratic values in society and enforce the rule of law, primarily on the governmental authorities, where the legitimacy of the constitution and the Basic Laws grant legitimacy to the judicial review.

Another key aspect of the legitimacy of the HCJ's authority to review the constitutionality of laws may be found in the implementation of the fundamental constitutional principle concerning the separation of powers—in the substantive sense of that principle (*i.e.*, in the sense of the

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25. BARON DE MONTESQUIEU, THE SPIRIT OF LAWS Vol. 1, ch. 4 (1748).

26. *See Mizrachi Bank*, CA 6821/93; *see also* Basic Laws of Israel, Judiciary § 15(c) (1984) [hereinafter Judiciary].

27. *Cf.* RUBINSTEIN & MEDINA, *supra* note 14, at 182; HCJ 246/81 Derech Eretz Ass'n v. Broad. Auth., 35(4) PD 1 [1981] (Isr.); HCJ 141/82 Rubinstein v. Speaker of the Knesset 33(3) PD 141 [1982] (Isr.); HCJ 726/94 Clal Ins. Co. v. Minister of Fin. 48(5) PD 441 [1994] (Isr.).

28. INBAR, *supra* note 20, at 84; RUBINSTEIN & MEDINA, *supra* note 14, at 151–63. *See generally* Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457 (2012).

29. INBAR, *supra* note 20, at 89.

30. *See Mizrachi Bank*, CA 6821/93.

31. RUBINSTEIN & MEDINA, *supra* note 14, at 265–311.

implementation of checks and balances).[32]

This is true *a fortiori*, given that the Basic Laws were accorded constitutional supra-legal normative status—particularly following the judgment in the *Mizrachi Bank* case.[33] That judgment laid out clear rules relating not only to the normative status of the Basic Laws but also to the normative mechanism involved in implementing them, including amendments and violations of rights protected by the laws, and examined the nature of formally entrenched Basic Laws and others which are substantively entrenched.[34]

D. *The Constitutional Operating Mechanism and its Implications: Varying Basic Laws versus Violating Protected Constitutional Rights; Formal Entrenchment versus Substantive Entrenchment*

A Basic Law may be varied only by means of another Basic Law; it cannot be varied through "ordinary legislation," whether the original Basic Law has been formally entrenched or not.[35] Moreover, a violation of a fundamental right protected by Basic Law: Human Dignity and Liberty is permitted only where that violation meets the cumulative conditions set by the limitation clause, as embodied in Section 8 of this Basic Law. In effect, the limitation clause, with its varied requirements, substantively entrenches the fundamental rights protected by Basic Law: Human Dignity and Liberty.

Apart from the latter Basic Law, fundamental rights are also protected by other basic legislation; for instance Basic Law: The Knesset, such as the right to vote and the right to be elected. This should be mentioned though that Basic Law: The Knesset does not incorporate any clause providing for substantive entrenchment (*e.g.*, the limitation clause). In cases where a fundamental right is violated in the latter context, a judicial limitation clause is applied. The judicial limitation clause, in essence, takes the content and requirements of the limitation clause familiar to us from Basic Law: Human Dignity and Liberty and "exports" it to other basic legislation, such as Basic Law: The Knesset, and consequently accords constitutional protection to fundamental rights where no statutory limitation clause exists (judicial limitation clause).[36]

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32. *Id.* at 127–28; HCJ 73/85 "Kach" Faction v. Speaker of the Knesset 39(3) PD 141 [1986] (Isr.); HCJ 306/81 Plato-Sharon v. Knesset Committee of the Knesset 35(4) PD 118 [1982] (Isr.); HCJ 5364/94 Welner v. Chairman of the Israeli Labor Party 49(1) PD 758 [1995] (Isr.).

33. *See Mizrachi Bank*, CA 6821/93.

34. *Id.*

35. *See id.*

36. HCJ 3434/96 Hoffnung v. Speaker of the Knesset 50(3) PD 57 [1997] (Isr.); HCJ 212/03 Herut Nat'l Movement v. Chairman of the Elections Comm. to the Sixteenth Knesset 57(1) PD (1) 750 [2004] (Isr.); EA 92/03 Mofaz v. Chairman of the Elections Comm. to the Sixteenth Knesset 57(3) PD 793 [2004] (Isr.).

The formula which should be applied to the judicial limitation clause, and consequently the interpretation which should be given to the elements of the judicial limitation clause, are identical to the formula and interpretation given to the wording of the limitation clause appearing in Basic Law: Human Dignity and Liberty, namely:[37]

> There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law.

To summarize these issues it should be emphasized:[38]

> (1) When considering Basic Laws which provide for both formal and substantive entrenchment (i.e., at present just Basic Law: Freedom of Occupation), any variations to such a Basic Law must be tested in accordance with the formal entrenchment, provided that the variation is effected by means of a Basic Law with a majority of 61 Knesset members, or any other majority which the particular Basic Law itself requires. However, a violation of fundamental rights under such a Basic Law must be tested on the basis of the substantive entrenchment (the requirements of the limitation clause).[39]
> (2) When considering Basic Laws, which provide for only substantive entrenchment (the limitation clause) (i.e., at present just Basic Law: Human Dignity and Liberty), any variations to such a Basic Law must be effected by means of a Basic Law albeit without the need for a particular majority. However, a violation of fundamental rights under such a Basic Law must meet the conditions of the substantive entrenchment provision (the requirements of the limitation clause).[40]
> (3) When considering a Basic Law which does not contain a provision for substantive entrenchment, then:
>
> (i) If it is formally entrenched, a variation to such a Basic Law must be carried out through a Basic Law adopted with the required majority, whereas a violation of a protected fundamental right must be carried out through and in accordance with the judicial limitation clause.

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37. Basic Laws of Israel, Human Dignity and Liberty § 8 (1992) [hereinafter Human Dignity and Liberty].

38. *Cf.* RUBINSTEIN & MEDINA, *supra* note 14, at 109–21.

39. HCJ 1368/94 Porath v. Government of Israel 57(5) PD 913 [1995] (Isr.).

40. HCJ 6055/95 Zemach v. Minister of Def. 53(5) PD 241 [1996] (Isr.).

(ii) If not formally entrenched, a variation to such a Basic Law must be carried out through a Basic Law adopted by any majority in the Knesset, whereas a violation of a protected fundamental right must be carried out through a variation of the Basic Law itself, or through and in accordance with the judicial limitation clause.

E. *The Nature of the Regime of the State of Israel as a (Liberal and Constitutional) Representative Parliamentary Democracy: The Legislature, the Executive and the Idea of a Referendum*

Accordingly we, members of the People's Council, representatives of the Jewish Community of *Eretz*-Israel and the Zionist Movement, are here assembled on the day of the termination of the British Mandate over *Eretz*-Israel and, by virtue of our natural and historic right and on the strength of the resolution of the United Nations General Assembly, hereby declare the establishment of a Jewish state in *Eretz*-Israel, to be known as the State of Israel. We declare that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath . . . (May 15th, 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called "Israel."[41]

The language of the Israeli Declaration of Establishment is sharp, clear and explicit: "until the establishment of the elected, regular authorities of the State, in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly . . ."[42] In other words, the governmental authorities, their identity, nature, structure and operative mechanisms were to be established in the constitution to be adopted by the Constituent Assembly. That is to say, the identity of the governmental authorities, including the manner of their election, would be determined within the framework of constitutional legal norms and not through ordinary legislation. This was put into effect with the adoption, *inter alia*, of Basic Law: The Knesset, Basic Law: The Government and Basic Law: The Judiciary.

The Declaration of Establishment does not possess statutory or

41. DECLARATION OF ESTABLISHMENT OF THE STATE OF ISRAEL ¶¶ 10 & 11 (Isr. 1948) ("*Eretz*-Israel" means "The Land of Israel.").

42. *Id.*

constitutional status. It is an interpretative source only. The Declaration of Establishment does not create binding positive law. It merely reflects the vision and credo of the People. Consequently, it is necessary to consider the statements made by the Supreme Court when interpreting and giving meaning to the laws of the state.[43] This is true especially in light of the explicit reference to the Declaration of Establishment within the "Basic Principles Clause" of Basic Law: Human Dignity and Liberty.[44] This clause states that human rights "under this Basic Law" must be interpreted in the spirit of the principles of the Declaration Establishment of the State of Israel.[45] The comments of Justice Dov Levin in the *Clal* case are apposite in this context:

> Although the Declaration of Establishment was not recognized as possessing constitutional validity and in any event did not purport to express binding law, it expressed principles and values, which according to the perception of the People deserved to be our guiding principles, an oracle, when interpreting the law applicable to the state and its citizens. Accordingly, from the early days this Court saw the Proclamation of Independence as a primary source for interpretation of the law. Above all – it is a beacon that illuminates our path when shaping basic civil rights and implementing them in practice.[46]

F. *The Legislature and the People: The Reciprocal Relationship Between the Legislature and the Executive*

The State of Israel is a liberal, constitutional, representative, parliamentary democracy. This is evident from the arrangements put in place for holding elections in Israel under both Basic Law: The Knesset and the Knesset Elections Law [Consolidated Version], 1969 (Knesset Elections Law).[47] The elections to the Knesset are the highest expression of the democratic nature of the regime in Israel. The constitutional and statutory arrangements express the desire for "self-government;" their purpose is to ensure that legislators represent the views of the public and use their legislative powers to advance the public interest. The elections to the Knesset express the ideal whereby every citizen is granted an equal opportunity to express his/her nature as a "political creature," by

43. HCJ 10/48 Ziv v. Acting Director of the Municipal Area of Tel Aviv 1 PD 85 [1949] (Isr.); HCJ 7/48 al-Karbutali v. Minister of Def. 2 PD 5 [1949] (Isr.); CA 450/70 Rogozinski v. State of Israel 26(1) PD 129 [1970] (Isr.); RUBINSTEIN & MEDINA, *supra* note 14, at 43.

44. *See* Human Dignity and Liberty, *supra* note 37, § 1.

45. *Id.*

46. *See supra* text accompanying note 27; Judgment of Justice Dov Levin ¶ 19.

47. The Book of Laws, no. 556 (Apr. 14, 1969).

recognizing the Knesset's power to act as the primary "public platform" for staging a public discourse regarding the proper nature of the State, while maintaining a "free market" of ideas and opinions.[48]

Israel's legislature is the Knesset; it is this body that has the exclusive power to make laws, as an expression of the will of the People. The People express their will through their representatives in the Knesset. Section 4 of Basic Law: The Knesset establishes the system of elections to the Knesset as follows: "The Knesset shall be elected by general, national, direct, equal, secret and proportional elections, in accordance with the Knesset Elections Law; this section shall not be varied save by a majority of the members of the Knesset."[49]

As we are concerned with a provision in a Basic Law, it is evident that it can only be varied by means of another basic legislation, adopted with the majority required by Section 4, namely, 61 Knesset members—given that the full number of the Members of the Knesset (MKs) is 120.[50] In other words, Section 4 cannot be varied by means of ordinary legislation, even if the entire Knesset unanimously adopts that legislation (*i.e.,* 120 MKs voting in favor).

The essence of the electoral system is to guarantee the democratic parliamentary nature of the Knesset, within the framework of which the People are represented by the parliamentary factions. The People vote for parties vying for a place in the Knesset. The elected party members, acting as a faction rather than in their personal capacity, choose the MK upon whom they recommend that the President impose the task of forming the government. Only the President is authorized to decide on the identity of the MK who will be charged with the duty of forming the government.

The parliamentary representative democracy is essentially intended to replace the classical concept of direct democracy, which originated in ancient Greece. That concept required all eligible voters to gather in the central square of Athens and vote "for" or "against." In a modern representative parliamentary democracy, the legislature is not comprised of the People but representatives of the People. And as its name denotes: "The Knesset is the parliament of the State."[51]

Evidence of this can be found in the fact that once the 120 representatives of the People are elected (who together comprise the legislature, namely, Israel's Knesset), the ability of the People (the sovereign) to make direct decisions is eliminated. Once the 120 representatives of the People have been elected, the power of the sovereign (the People) can only be expressed in the political arena

48. RUBINSTEIN & MEDINA, *supra* note 14, vol. 2, at 557.

49. Knesset, *infra* note 51, § 4.

50. *See Mizrachi Bank*, CA 6821/93; Knesset, *infra* note 51, § 4.

51. Basic Laws of Israel, The Knesset § 1 (1958) [hereinafter Knesset].

through its various representatives in the Knesset, and through them alone. This concept has many practical implications.

To start with, MKs are not directly elected by the People, but rather by their parties—and sometimes solely by the head of these parties—and presented to the People as candidates for the Knesset (factions).[52]

In addition, in Israel, members of the executive branch are generally elected from among the MKs. Indeed, as a matter of statutory duty, some executive branch positions must be filled by MKs; for example the positions of Prime Minister,[53] Acting Prime Minister,[54] and deputy ministers.[55]

Furthermore, the Knesset's ability to disperse does not depend on the People, as they actually have no power to dissolve the Knesset. The Knesset's power to dissolve itself before the completion of its four-year term can be implemented only by means of a law, for which a majority of 61 MKs is needed.[56] More specifically, not only is the dissolution of the Knesset independent of the People who elected it—that dissolution depends, first and foremost, on the executive branch, namely, the government. This is because the only cases in which the Knesset can disperse prematurely are: (a) when it has failed to approve the State's budget submitted to it by the executive branch, within the first three months of the fiscal year;[57] and (b) when the Prime Minister recommends, and the President agrees, to disperse the Knesset on the grounds that a majority in the Knesset opposes the executive branch, thereby prevents the Government from functioning properly.[58]

Besides, legislative work, which is exclusively within the province of the Knesset, is not, and cannot be, directly affected or directed by the People. Only MKs, the Government, and the Knesset committees have the authority to table bills. The Knesset plenum and committees, assisted by legal advisers of the Knesset, participate in the various stages of the legislative process and (unless otherwise statutorily provided, as explained above) it is the Knesset plenum that enacts laws by majority vote of the participants.

Moreover, where the Knesset seeks to extend its term, in view of the existence of special circumstances that prevent the holding of timely elections, it has the power to do so even without having to go back to the People. Such an extension may be achieved by the enactment of a law

52. *Id.* § 5A.
53. Basic Laws of Israel, The Government § 5(b) (2001) [hereinafter Government].
54. *Id.* § 5(d).
55. *Id.* § 25.
56. Knesset, *supra* note 51, § 34.
57. *Id.* § 36A.
58. Government, *supra* note 53, § 29.

passed by a majority of 80 MKs.[59]

Not only that, but also the salaries of the MKs are prescribed by statute which the MKs themselves enact. MKs, when setting their own wages, do not consult with the People, and the latter have no impact whatsoever on such decisions.[60]

Another argument is that, whereas the election of MKs to the Knesset, as representatives of the People, depends, largely, on the People—through the parties that select their representatives in the Knesset—this is not the case with regard to an MK resignation. This last issue is the sole prerogative of the MK concerned.[61]

Furthermore, in view of the provisions of Basic Law: The Knesset in this regard, which cannot be stipulated against, when it comes to the termination of an MK tenure by virtue of his/her appointment to a position, the holder of which is barred from standing as a candidate for the Knesset,[62] or termination or suspension because the MK has been convicted of an offense entailing moral turpitude, he cannot continue in office even if the entire nation so desires.[63]

Additionally, the Knesset elects the President of the State,[64] the State Comptroller,[65] the two MKs who represent it on the Judicial Selection Committee and the two MKs who represent it on the electoral body of the Chief Rabbinical Council.[66] In these activities, the Knesset, as a body, operates in accordance with its absolute discretion, in a manner consistent with the thinking of the People's representatives. The representatives of the People do not turn to the People for advice.

Moreover, the power to remove the President of the State, the State Comptroller and the Prime Minister from their positions is entrusted to the Knesset.[67] In practicing their power, in this regard, MKs do not have to consult with the People on that issue.

Added to all these is the provision concerning the replacement of MKs, according to which any MK who has vacated his/her seat, will be automatically replaced by his/her party's appointed candidate whose name appears first in the party's list of candidates who were not elected

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59. Knesset, *supra* note 51, § 9A.

60. *Id.* § 39.

61. *Id.* § 40.

62. *Id.* § 42.

63. *Id.* §§ 42 & 42A.

64. The Basic Laws of Israel, The President of the State § 3 (1964) [hereinafter President of the State].

65. The Basic Laws of Israel, The State Comptroller § 7 (1988) [hereinafter State Comptroller].

66. *See* President of the State, *supra* note 64, § 3(A); State Comptroller, *supra* note 65, § 7(A); Judiciary, *supra* note 26, § 4(B); The Rabbinical Judges Law of 1955, § 6(A).

67. President of the State, *supra* note 64, § 20; State Comptroller, *supra* note 65, § 13; Government, *supra* note 53, § 18.

to the Knesset.[68] This provision, like the crystallization and finalization of the party's MKs candidates list, does not consider the will of the People at all; a will that could have changed after the initial list of candidates for the Knesset has been completed.

A final example in this context concerns the quasi-judicial role of the Knesset, as a body, in relation to the removal of the procedural immunity of MKs.[69] While the People elect their representatives in the Knesset "directly" or almost directly, the MKs may remove the procedural immunity of another Knesset member, without first consulting with the People, even though this immunity is required in order for the MKs to discharge the mandate which they were elected to serve in the Knesset. In this regard, it should be noted that this mandate is entrusted to them in accordance with their declaration of allegiance under Section 15 of Basic Law: The Knesset.

Thus, immediately upon their election, the umbilical cord between the 120 representatives to Israel's parliament and the People is severed. Even if the elected MKs breach the terms of the manifesto upon which they were elected, the People would still lack the power to replace them at this stage, and would have to wait for the next election to do so. Thus, not only is the influence of the People indirect, insofar as concerns the dealings of the legislature following elections, but is indirect in general.

In conclusion, to this latter point, it should be emphasized that the Knesset's decisions are reached by a majority within the Knesset,[70] and not by a majority of the People, albeit the underlying assumption is that the various MKs accurately reflect the distribution of the People's views on a concrete issue. In fact, this is not the case. The 120 elected representatives' commitment to voters is confined to the moral and declarative arena only, and indeed one should note Section 15 of Basic Law: The Knesset, in this regard, according to which, following his/her election to the Knesset, the MK declares his/her allegiance as follows: "I pledge myself to bear my allegiance to the State of Israel and faithfully discharge my mandate in the Knesset."[71]

The moral and declarative credibility of the representatives of the People is scrutinized every four years when elections are held for the Knesset. Beyond this, there is no direct correlation between the functioning of MKs, including their decision making process, and the People. Basic Law: The Knesset also refrains from establishing any primary legal norm that would allow MKs to return to the People for the purpose of making decisions; this is part of the broader understanding of the structure of the representative parliamentary system, which binds the

68. Knesset, *supra* note 51, § 43.
69. *Id.* § 13; Knesset Members Immunity, Rights and Obligations Law, 1951, § 13.
70. Knesset, *supra* note 51, § 25.
71. *Id.* § 15.

State of Israel.

Why is that so? The answer lies in the governmental system in Israel, under which the People wield power in relation to parties and factions but not in relation to the members of the parties elected to the Knesset. This power manifests itself every four years. It should be recalled that not all parties operate a system of primary elections. Within its four-year term, the legislative authority is therefore limited by and subordinate to the personal desires of its members; the collective party discipline of the members of each faction; operational, professional and non-professional considerations of the executive authority; professional and non-professional parliamentary considerations of each individual Knesset member; and professional and non-professional political, narrow, broad, regional, nationalistic, national and international considerations.

Again, it is worth emphasizing that MKs are elected representatives. After the elections, they operate within the framework of their parties. The parties and the MKs represent a wide range of attitudes and opinions on various topics. These attitudes and opinions are reflected in the Knesset's plenum and committees' discussions and decisions. This is also the source of the concept of "party discipline," which often imposes certain opinions on MKs that do not necessarily reflect the will of the voters (*i.e.*, the People). Hanna Fenichel Pitkin has lucidly articulated the nature of the representative parliamentary electoral system, as follows:

> representing here means acting in the interest of the represented, in a manner responsive to them. The representative must act independently, his action must involve discretion and judgment; he must be one who acts. The represented must also be (conceived as) capable of independent action and judgment, not merely being taken care of. Moreover, despite the resulting potential for conflict between representative and represented about what is to be done, that conflict must not normally take place. The representative must act in such a way that there is no conflict, or if it occurs an explanation is called for. He must not be found persistently at odds with the wishes of the represented without good reason in terms of their interest, without a good explanation of why their wishes are not in accord with their interest.[72]

In this context, it is also worth quoting the remarks of Justice Aharon Barak in the *Mizrachi Bank* case:

> Our political and legal culture is not based upon a special appeal to the People by means of a referendum. No referendum has taken

72. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 209–10 (1972).

> place in the past. Our political and legal culture is not built upon "direct" democracy, but upon "representative" democracy. Our political and legal culture also maintains *that the appeal to the People takes place in the context of the elections for the Knesset.*[73]

G. *The Executive Authority and the People: The Reciprocal Relationship Between the Executive and Legislative Branches*

Not only do the People have no real impact on the legislature, they also have no real influence over the government. Interaction exists only between the legislative and the executive authorities. As I have already shown, the argument that the legislature represents the People is answered by the fact that the People's influence over the legislature is confined to Election Day, once every four years, and even then only to a limited extent.

In the State of Israel, it is customary for most of the members of the executive authority to be selected from among the 120 MKs; sometimes positive law itself requires this.[74] Nonetheless, neither the Prime Minister nor the Government are directly elected by the People. If anything, it could be argued that because of the Israeli practice as described above, the People have some influence over the abstract identity of the members of the Government. Yet, even if the latter were true, presently the People do not have the capacity to decide on the identity of the Prime Minister, as the authority to impose the task of forming the Government on any of the 120 MKs is vested exclusively in the President, following consultation with the representatives of the parliamentary parties.[75]

In addition, the Government is collectively responsible towards the Knesset; whereas the ministers, who in the main are themselves MKs, are accountable to the Prime Minister in respect of the functions they are appointed to fulfill.[76] No Prime Minister, minister, or Government is, as a single large entity, accountable to the People as such. Instead, the Government alone, as a cohesive body, is collectively responsible to the Knesset in the latter's capacity as the representative body of the People. Consequently, when examining the Government's responsibility, it is necessary to refer to the Knesset as a body, rather than to the People as a nation.

In support of this position, we must consider Section 3 of Basic Law: The Government, according to which: "The Government holds office by virtue of the confidence of the Knesset;" in other words, not by virtue of

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73. *Mizrachi Bank*, CA 6821/93; Judgment of Justice Barak ¶ 49 (emphasis added).
74. *See supra* text accompanying notes 53–55.
75. Government, *supra* note 53, § 7.
76. *Id.* § 4.

the direct trust of the People, but by their implied confidence—shown through the Knesset.[77]

In this spirit, we must read the words of the declaration of allegiance spoken by the Prime Minister: "I (name), as Prime Minister, undertake to uphold the State of Israel and its laws, to faithfully fulfill my role as the Prime Minister and to comply with the decisions of the Knesset," as well as the declaration of allegiance spoken by the ministers: "I (name), as a member of the Government, undertake to uphold the State of Israel and its laws, to faithfully fulfill my role as a member of the Government and to comply with the decisions of the Knesset."[78] These two declarations give effect to the obligations of the executive branch toward the legislative body, known as the "Knesset," and not to the People who have elected their representatives who constitute the "Knesset." This conceptual approach is reinforced by a consideration of Section 15 of Basic Law: The Government, in relation to the need for the Knesset's approval before an additional minister may be co-opted to the Government.[79]

The People, as such, also lack the power—save through their representatives in the Knesset—to affect the status of the Prime Minister, his/her government or his/her ministers.[80] We have already seen that the People have no real influence on their representatives in the Knesset, whereby, the People have no influence either over the executive authority, save on a single occasion, once every four years.

Moreover, oversight of the Government is entrusted to the Knesset. This is reflected in the plenum through the submission of motions for the agenda and parliamentary questions, as well as discussions in Knesset committees to which ministers or their representatives are summoned to report on their activities in their capacity as the executive branch.[81]

Even the salaries of ministers and deputy ministers, including other fees paid to them during their term of office or thereafter, or their next of kin after death, are determined by law—enacted, as noted, by the Knesset—or by a decision by the Knesset or one of its committees, authorized by the Knesset for that purpose.[82]

The life of the Government, its functioning and efficiency therefore, depend largely on the life of the Knesset as the body representing the People, and not on the People directly. Government decisions to go to war[83] or enter into peace agreements are subject, at most, to the approval

77. *Id.* § 3.
78. *Id.* § 14.
79. *Id.* § 15.
80. *See, e.g.*, Government, *supra* note 53, § 18.
81. Knesset Law, 1994; Knesset Regulations.
82. Knesset Law, 1994, § 16.
83. Government, *supra* note 53, § 40.

of the Knesset, but not to the approval of the People. The mandate is given from the start to the Knesset alone, and it is the supreme body from which the executive branch draws its vitality; it and it alone. The authority of this body, as the house of representatives of the People, remains in effect as long as it has not dispersed in accordance with the grounds prescribed by law and as long as no further elections have been held in Israel. Until then, the People do not wield direct power, which would enable them to influence the activity of the Knesset, and certainly not the activity of the Government. A weighty question arises: What are the powers of the Government? The answer to this question is found in Basic Law: The Government.

At this point, it should be emphasized that Basic Law: The Government, including all its sections and subsections, is formally entrenched. In other words, this law cannot be varied, save by a Basic Law adopted by the Knesset with a majority of 61 MKs.[84]

As provided in Section 32 of Basic Law: The Government, which states: "The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority," the principle authority of the executive branch is residual in nature.[85] This provision is entrenched, as stipulated in Section 44 of the same Basic Law, so that varying the residual powers of government, as provided in Section 32, requires the adoption of a Basic Law by a majority of 61 MKs.[86]

On its face, this residual power erodes the status of the Knesset as the body that determines the functions of government and the scope of its powers in basic legislation or by statute. This is because the principle of the rule of law and the principle of administrative legality require that the executive authority act only within the scope of the powers conferred upon it by law—by the Knesset.[87] However, the scope of the activity imposed on the executive branch is immense and accordingly cannot be regulated in its entirety by statute.[88] This requires the Government to act routinely in areas that the Knesset has not yet regulated through primary legislation.[89]

The Government's residual power is designed for this purpose, and is applied only where the subject matter of the authority has not been imposed by law on another authority, and is always subject to any

84. *Id.* § 44.

85. *Id.* § 32.

86. *Id.*

87. HCJ 36/51 Chet v. Municipality of Haifa 5 PD 1553 (Isr.); HCJ 347/84 Petach Tikvah v. Minister of the Interior 39(1) PD 813, 817 (Isr.).

88. RUBINSTEIN & MEDINA, *supra* note 14, at 159–62.

89. HCJ 5128/94 Federman v. Minister of Police 48(5) PD 647 (Isr.).

applicable law.[90] In order to enable the Government to properly fulfill its role as the executive branch,[91] Section 32 of Basic Law: The Government is designed to build a constitutional bridge between the principles of administrative legality and the rule of law and the daily needs of the country.

The powers of the Government, therefore, are subject formally, legally and, primarily administratively, to the Knesset. Certainly, the Government is responsible for managing the daily life of the People, but its decisions are not subject to the approval of the People, and, at most, require the approval of the People's representatives in the Knesset.

H. *Interim Conclusion*

Without entering into a discussion about the advantages and disadvantages of the representative parliamentary system, the remarks made above leave no doubt that the People, as the sovereign, lack any function, formal or substantive, in the political game. This is because interaction is confined primarily to the legislative and the executive authorities. The role of the People and their power to directly—or almost directly—exert serious influence is expressed only on Election Day by which, once every four years, the People exert their influence. In the interim, the representatives of the legislative authority and the representatives of the executive authority—who often are the same—must engage in a balancing process between the mandate, which they were elected or appointed to carry out, and other considerations required by the job and the needs of the hour. These representatives must weigh political, factional, partisan, regional, national, nationalistic, international, parliamentary and diplomatic considerations, some of which are professional and some unprofessional, some narrow and some broad, some formal and some substantive.

This conceptual and practical approach is mandated, *inter alia*, first by the fact that the citizens, who constitute the People, are in large laymen, and second by the need to engage in numerous balancing processes, among a broad variety of considerations, as part of the process of parliamentary and operational decision-making. The laymen citizens are often unaware of, or at minimum unable to digest, these balancing processes and considerations. Finally, when engaged in faithfully performing its work, the executive authority often comes to arrangements of which the layman citizen has no knowledge whatsoever, and which, if exposed to, would almost certainly undermine their success. For example, decisions to sign or avoid signing peace agreements, or decisions to start

90. HCJ 8600/04 Shimoni v. Prime Minister 59(5) PD 673 (Isr.).

91. HCJ 1163/03 Supreme Monitoring Committee for Arab Affairs v. Prime Minister (Isr.) (unpublished).

or avoid a war, or decisions to engage in or reject a prisoner exchange.

I. *Basic Rights in Israel: The Right to Vote, the Right to be Elected, the Right to Dignity and the Right to Equality*

The rights to vote and to be elected are fundamental rights in any democratic regime. Ensuring the right of individuals to participate in elections is an essential service in a democracy. The rights to vote and to be elected do not exist in a vacuum; they are founded and supported by the entire mechanism of the election laws, as established, in Israel, by Basic Law: The Knesset and the Knesset Elections Law. The election process is not limited to the formal meaning of the proceedings, but rather has substantive, practical and conceptual implications. These implications relate, *inter alia*, to the ability of the citizens to exert a substantive, and not only formal, influence over the democratic process, both as voters and as candidates for election.

The realization of the rights to vote and to be elected—especially in a society that is polarized and torn on politic, ethnic, national, religious and gender lines—is largely dependent on a deep and substantive understanding of the right to dignity and the right to equality.

The principle of equality is one of the cornerstones of any democracy, and essentially refers to equal treatment being accorded to all human beings, without attaching importance to the various characteristics of human beings, such as social status and family affiliation, sex, age, religion, language, skin color and so on. The principle of equality underlies liberal thought and forms the basis for additional democratic principles.

It is possible to understand the increasing recognition given to the centrality of the principle of equality, as part of the transition from a class society where the individual is perceived as possessing a status from birth—a status which frames his/her rights, duties, and expectations—to a contractual society, where the individual must reach his/her position on the basis of individual initiative. In order to enable real participation and competition in the contractual decision-making process,[92] the legitimacy of such a contractual society should depend on ensuring equal opportunities to all its members.

Notwithstanding the recognition of the importance of the principle of equality in Israeli law following the adoption of Basic Law: Human Dignity and Liberty, the right to equality was not expressly entrenched at the constitutional level. Accordingly, as we shall see, the constitutional protection of the right to equality in Israeli law is primarily a creature of

92. Frances Raday, *"On Equality,"* 24 MISHPATIM (THE LAW) 241, 245 (1994) (in Hebrew).

case law. In its rulings, the HCJ has referred to the principle of equality as a supra principle, which is "the heart and soul of our whole constitutional system" and infringement of which creates "a particularly harsh feeling."[93]

Like a number of other democratic principles, equality has a dual meaning, one formal and the other substantive. The principle of formal equality refers to the operation of the law by the courts in an impartial manner and without distinction between litigants (equality before the law). In contrast, the principle of substantive equality does not consider only the equal operation of the law but rather the law itself (equality in law). The principle of substantive equality was first recognized in a clear and definitive manner in article 6 of the French Declaration of Human and Civil Rights dated August 26, 1789, under which:

> The law . . . must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents.[94]

In modern constitutional and liberal thinking, the principle of equality is not formal. It is a fundamental concept that embodies fairness, justice and morality. There is no "pure" principle of equality. Equality, justice and morality cannot be completely separated. Equality is a mixture of all these concepts. Thus, for example, equality and equal opportunity may actually be expressed by giving preference to persons bearing certain characteristics who have suffered discrimination in the past and who are now at an unequal starting point (affirmative action).

The principle of equality has been recognized in many human rights documents[95] as well as in the British Mandate for Palestine.[96] Likewise, in the Declaration of Establishment of the State of Israel, the founding fathers promised that "Israel . . . will ensure complete equality of social and political rights to all its inhabitants, irrespective of religion, race or sex."[97]

The early days of the State of Israel also witnessed the enactment of various primary statutes providing protection for equality, such as the

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93. HCJ 98/69 Bergman v. Minister of Finance 23(1) PD 693 (Isr.).

94. *See* The French Declaration of Human and Civil Rights 1789.

95. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

96. British Mandate of Palestine arts. 2 & 15; Palestine Order-in-Council, arts. 17–19a (1922) (restricting the legislative powers of the High Commissioner, in view of the requirement that "no Ordinance may be passed which shall tend to discriminate in any way between the inhabitants of Palestine on the ground of race, religion or language").

97. *See supra* note 41.

Equal Rights for Women Law, 1951; Section 42(A) of the Employment Service Law, 1959; and the Equal Opportunities at Work Law, 1988.[98] This legislative protection may be found in the judicial presumption whereby the purpose of legislation is to promote and maintain equality. In other words, in order to contradict this presumption, express language is required. For example, the Equal Rights for Women Law proclaims the existence of a value which should properly encompass our entire legal system.[99] Therefore, where this law is not expressly contradicted, an interpretation of the law that is consistent with the principle of equality between the sexes should be preferred.[100]

There is no dispute as to the importance, and even critical nature, of the right to equality within a bill of rights, especially in democratic regimes. Thus in Basic Law: Human Dignity and Liberty bill, the right to equality was included among the list of rights protected by the Basic Law.[101] However, due to opposition by the religious parties, the right to equality was omitted from the final version of the Basic Law. This opposition was due to the religious parties' concern that a constitutional right to equality would lead to equal recognition of women, homosexuals, and, even worse (in their eyes), the reform movement. Accordingly, in order to preserve the *status quo* (at least formally) *vis-à-vis* the religious parties, the Knesset deliberately waived the inclusion of the right to equality within the Basic Law. Thus, at least *prima facie*, the arrangement is a negative one. Nonetheless, a perusal of the Knesset records indicates that some MKs—in their "constitutional" capacity—believed that it was the HCJ that should eventually interpret the Basic Law and hold that human dignity included the right to equality. In other words, the omission of the right to equality in the Basic Law would not negate the protection of this right within the framework of the right to dignity.

Either way, it should be noted that it is not possible to deny the existence of constitutional protection of the principle of equality, as a value and not as a right. This is true particularly in light of the addition of a new Section 1 to the Basic Law, in 1994, according to which: "Fundamental human rights in Israel . . . shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel,"[102] and in light of the language and purpose of Section 1A of the Basic Law, according to which: "The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the

98. The Book of Laws, no. 1240, (Mar. 3, 1988).

99. The Book of Laws, no. 82, (July 26, 1951).

100. HCJ 104/87 Nevo v. Nat'l Labor Court 44(4) PD 749, 764 (Isr.); HCJ 301/63 Schtreit v. Chief Rabbi of Israel 18(1) PD 612 (Isr.).

101. *See* Yehudit Karp, *Basic-Law: Human Dignity and Liberty: A Biography of Power-Struggles*, 1 MISHPAT UMIMSHAL (Law & Governance) 323, 336 (1993) (in Hebrew).

102. Human Dignity and Liberty, *supra* note 37, § 1.

values of the State of Israel as a Jewish and democratic state."[103] This approach is based on a broad interpretation of the right to "human dignity and liberty" and the reference to the principles of the Declaration of Establishment.[104] This is because this approach accords supra legal normative status to the principle of equality.[105] Yet, one may ask, what connection does equality have to dignity?

Section 4 of Basic Law: Human Dignity and Liberty states: "All persons are entitled to the protection of their life, body and dignity."[106] In the past, consideration was often given to the nature of the right to dignity as a framework right. As such, the right to dignity merely provided a source of recognition of other basic rights, for example, the right to freedom of expression. Both the legal literature and the rulings of the Supreme Court expressed the view that the constitutional right to dignity also embraced constitutional protection of the right to equality. In other words, where primary legislation violates the right to equality, it must meet the requirements of the limitation clause set out in Section 8 of the Basic Law, otherwise, it would be unconstitutional.

It is permissible to contemplate a distinction between two individuals based on relevant considerations but not on irrelevant ones.[107] The right to equality and the right to dignity are closely related to each other. The core meaning of the right to equality is that the social order must reflect recognition of all human beings as equals. As such, the right to dignity provides, at minimum, the means to attain equality. The core meaning of the right to dignity is that which seeks to emphasize the treatment of a person as an end in itself, and not as a means to achieve other goals. Use of a person as a means is nothing but more refined language for describing the humiliation and degradation of a man. The terms "degradation," "humiliation" and "dignity" are intertwined with the concept of "equality." In the words of the philosopher Aristotle: "Democracies have arisen from supposing that those who are equal in one thing are so in every other circumstance."[108] In the past, the Supreme Court of Israel occasionally considered the question of recognizing the right to equality within the boundaries of the right to dignity as a framework right (or basket right). Much ink has been spilt on the nature of the right to dignity as a basket right. As such, it encompasses many rights which are not

103. *Id.* § 1A.

104. *See supra* note 41.

105. HCJ 453/94 Israel's Women Network v. Gov't of Israel 48(5) PD 501 (Isr.); HCJ 721/94 El Al Israel Airlines Ltd. v. Danielowitz 48(5) PD 749 (Isr.).

106. Human Dignity and Liberty, *supra* note 37, § 4.

107. FH 10/69 Boronowsky v. Chief Rabbi of Israel, 25(1) PD 7 (Isr.), and in the language of Justice Or: "unlawful discrimination means different treatment of equals." *See* HCJ 678/88 Cfar Vradim v. Minister of Fin. 43(2) PD 501 (Isr.).

108. Aristotle, THE POLITICS OF ARISTOTLE, Bk. V, Ch. 1 (William Ellis trans. 1947).

expressly referred to in the Basic Law. By its very nature, the right to dignity also includes equality. The dignity, which is inviolable and is entitled to protection, does not only embrace a person's good name, but also his/her status as equal among equals. His/Her dignity is violated not only through slander, insults or abuse but also by discrimination or treatment of him/her in a biased, racist or demeaning way. Protection of human dignity is also reflected in securing equal rights and preventing any discrimination on grounds of sex, race, language, opinion, social affiliation, family affiliation, marital status, ethnic origin and the like.

This deep understanding of the right to dignity and the right to equality highlights the critical nature of the rights to vote and to be elected. The latter are not only official state procedures expressed through the participation or possibility of participation in the political game. Recognition must be given to the capacity of the political process to have a significant impact. This is particularly true in the case of a representative parliamentary democracy based on compromises and balances, as distinct from formal and technical dichotomies.

Violation of an individual's fundamental rights is serious in itself. Violation of fundamental rights on a group or collective basis is even more severe. Collective injury perpetuates a certain kind of inferiority, one imposed by the discriminatory authority on the discriminated group. Group discrimination perpetuates severe social stigmas, and entails the humiliation and degradation of the individual members of the group against whom discrimination is being shown. Group discrimination illustrates the use of human beings as a tool to achieve other goals, more than anything else does; a treatment that leads to acute harm to the dignity of man.

III. FROM THE GENERAL TO THE PARTICULAR

This Article deals with the issue of the constitutionality of the laws on referendum. In the earlier sections I laid the normative foundation of the legal system and regime in the State of Israel, and it is within this normative framework that I shall examine the constitutionality of the Israeli laws on referendum.

A. *Conceptual and Israeli Aspects of a Referendum*

The existence of a mandatory referendum regime, as proposed by the laws on referendum, subordinates governmental decisions and the will of the legislature to the results of such referendum. Therefore, it has numerous legal, statutory, constitutional, administrative, national, international and political implications. Shmuel Saadia and Liav Orgad,

in their comprehensive essay on referenda, addressed this issue in detail and particularly discussed the considerations militating against the adoption of the institution of the referendum.[109]

A referendum, in relation to the question being posed, is a tool used as a substitute for the legislature, particularly when it fetters the executive branch and the legislative branch and is not merely a consultative referendum, leaving the interpretation of the results to the legislature.

The existence of referenda weakens the power of the elected government in that they indicate that the electorate does not trust the government to make certain decisions. In addition, a referendum can be skewed by the nature of the question and the imposition of limitations on the scope of the response available to the voter.

Furthermore, considerable technical knowledge is required in order to make informed decisions on a variety of issues on the public agenda, knowledge which most of the public lacks, and for this reason alone, any reached outcome could work out to be against the public interest.

A constitutional democratic regime, particularly in divided and multicultural societies, is characterized as a substantive democracy (*i.e.*, a regime that reflects the majority opinion, but at the same time protects minority groups). In such a regime, acute importance attaches to the governmental decision-making process led by the representative parliamentary system. In the representative system, the executive and the legislative branches have room to make decisions based on political compromises or a desire to show tolerance towards vulnerable groups in the society; namely, groups which are unable to express their wishes through a built-in majority in the society.

In contrast, in a regime that incorporates referenda, the governmental system is based on dichotomous decisions of "yes" or "no" ("for" or "against") in relation to the question addressed directly to the public, on a particular topic. Decisions by referenda are circumscribed, rigid and irreversible, and embody the repugnant concept of formal democracy which most of the modern substantive constitutional democracies in the West have long abandoned.

Moreover, a referendum may be used as a political and legal tool to exploit the democratic process, by way of formal democracy, while ignoring the rights and interests of the minority, as well as oppressing the rights of this minority, both as individuals and as a collective. A referendum may reinforce the numerical inferiority of the minority and even translate it into material and legal inferiority; that which deals a mortal blow to the principle of equality before the law, and *a fortiori*, the principle of substantive equality.[110] A referendum can create a tyranny of

109. SAADIA & ORGAD, *supra* note 18, at 56–79.

110. *Cf.* AHARON BARAK, INTERPRETATION IN LAW, LEGISLATIVE INTERPRETATION 522

the majority, and lead to the misuse of the democratic apparatus. Elsewhere I wrote:

> Constitutional democracy bears some unique features. Constitutional democracy is not merely a representative system, it is not only the voice of the majority, and it is not solely the voice of the legislature. Constitutional democracy is a balancing system, it is the voice of the majority but also the guard for minorities and their human rights, and it is the voice of the legislature only when it enacts laws in accordance with the fundamental highest principles of the Law, namely, justice, reasonableness, and proportionality. Constitutional democracy is not a melting democracy, so-called defensive democracy, but still it is not a suicide pact. Constitutional democracy is not a total system of deprivation, suppression, and criminal punishment, but a system of tolerance.[111]

Referenda thus weaken the power of the Knesset and expose its misuse. Referenda as a means of direct democracy are problematic devices in a democratic society with ethnic nationalistic characteristics. Use of referenda as a governmental process may turn the referenda into effective barriers against the influence of the minority on the decision-making processes and indeed remove any remaining influence over the legislature.[112]

Moreover, the referendum mechanism brings substantive acutely disputed issues for final decision, while undermining social and public stability and indeed potentially negating social cohesion. This is particularly true in highly divisive societies, where often the absence of decisions on such complex and sensitive issues—is the key to the development of a political dialogue that allows balanced and considered political decisions to be made. In the case of *Ram Engineers and Contractors Ltd.*, Justice Aharon Barak explained this point as follows:

> Tolerance is a central value of public order. If every individual in a democratic society would seek to fully satisfy his desires, society would end up unable to fulfill even a few aspirations. In the natural course of things, a healthy society is based on mutual concessions

(1993) (in Hebrew).

111. Mohammed S. Wattad, *The Meaning of Wrongdoing*—A Crime of Disrespecting the Flag: Grounds for Preserving "National Unity"? 10 S.D. INT'L L.J. 5 (2008).

112. Amal Jamal, *Direct Democracy, Ethnic Democracy and the Limits of Influence: Referendum and the Palestinians in Israel*, *in* PHANTOM IN POLITICS: REFERENDA IN ISRAEL (Dana Arieli-Gorowitz ed., Jerusalem: Magnes 2006) (in Hebrew).

and mutual tolerance.[113]

The importance of these comments is reinforced when considering whether the purpose underlying the laws on referendum is a proper purpose or not. In other words, a purpose may be considered improper if it undermines the fabric of life and the stability of society. See also:

> Democracy is based on tolerance . . . Indeed, tolerance constitutes both an end and a means. It constitutes a social goal in itself, which every democratic society should aspire to realize. It serves as a means and a tool for balancing between other social goals and reconciling them, in cases where they conflict with one another.[114]

The ability of politicians to bypass parliament and appeal directly to citizens, particularly in democratic regimes lacking a formal written constitution, could allow a charismatic leader to present himself/herself as someone who, contrary to the elected politicians, is carrying out the "will of the People." The weakening of parliamentary institutions before a deeply rooted democratic political tradition that has been formed is dangerous and could lead to personalization of government.

B. *The Referendum Law: Its Characteristics, Nature and Application*

Israeli democracy has not implemented a referendum since 1948, even though the demand to make use of this device for one-time decision making purposes or as a permanent mechanism has occasionally been voiced.

The use of the device of the referendum as a mechanism, which subordinates the decisions of the Government and even the Knesset decisions—whether in a general and sweeping manner or in relation to concrete issues—however worthy it may be, touches upon the core of the system of government in Israel. It would be appropriate, as we learned from the Declaration of Establishment, quoted above, to determine this matter within the context of a constitution or a constitutional legislation such as Basic Law enactment.

Indeed, the electoral system in Israel is regulated by Section 4 of Basic Law: The Knesset, as well as other constitutional provisions in the body of this Basic Law. As noted, Section 4 of this Basic law (The Electoral System) may only be varied by a Basic Law passed by a majority of the MKs.

In support of this analysis it should be recalled that on May 28, 1995

113. CA 105/92 Ram Engineers and Contractors Ltd. v. Upper Nazareth Municipality, 47(5) PD 189, 211 (Isr.).

114. AHARON BARAK, THE JUDGE IN A DEMOCRACY 28 (2006).

the Israeli Minister of Justice, at that time, Professor David Libai, appointed an internal committee, headed by Deputy Attorney General Shlomo Guberman, to prepare a draft law for a referendum on a specific topic to be determined.[115] The committee report discussed, at length, the difficulty of changing the electoral system through a referendum. This difficulty ensued from the formal entrenchment provided by Section 4 of Basic Law: The Knesset. In other words, in the committee's view, the Knesset alone was competent to change the electoral system; the People could not do so through a referendum. That is, Basic Law: The Knesset could not be indirectly varied through a referendum,[116] because the option of a referendum regarding any change in the electoral system did not appear within the language of Section 4 of Basic Law: The Knesset.

Moreover, subjecting government decisions to referenda means constricting the residual authority of the Government as anchored in Section 32 of Basic Law: The Government; a constitutional legal norm which is formally entrenched, and which cannot be varied save by a Basic Law passed by a majority of the MKs (as required by Section 44 of this Basic Law).

In any event, where the State of Israel wishes to hold a "referendum," as a positive binding device, it is incumbent upon it to do so through a Basic Law, adopted by a majority of the MKs, both by virtue of Section 4 of Basic Law: The Knesset and in compliance with Section 44 of Basic Law: The Government. This is because these are the two Basic Laws that establish, *inter alia*, the principles of the regime and regulate the powers of the two main branches of government in Israel. This is a fundamental issue of the first order and certainly, not a technical one. As a matter of principle, a change to the system of government, even without the explicit language of Section 4 of Basic Law: The Knesset and Section 44 of Basic Law: The Government, must be implemented through the enactment of basic legislation.

Support exists for this view. In the *Mizrachi Bank* case itself, Justice Cheshin addressed the question whether the Knesset is permitted to enact an entrenchment provision that requires the approval of a particular statutory amendment by means of a referendum. In his comments, he avoided making a decision relative to the validity of such a provision, but at the same time cast doubt on the Knesset's power to act in this way.[117] In this context, it is apt to quote again the remarks of Justice Aharon Barak, in the *Mizrachi Bank* case:

> Our political and legal culture is not based upon a special appeal

115. The State of Israel, Ministry of Justice, "Referendum – Committee Report" (in Hebrew).

116. SAADIA & ORGAD, *supra* note 18, at 147.

117. *Mizrachi Bank*, CA 6821/93 (Isr.).

> to the People by means of a referendum. No referendum has taken place in the past. Our political and legal culture is not built upon "direct" democracy, but upon "representative" democracy. Our political and legal culture also maintains *that the appeal to the People takes place in the context of the elections for the Knesset.*[118]

A provision of this type was created in Section 3 of the Golan Heights Entrenchment Law. It is worth emphasizing that Section 4 of this Law stated that the provisions of Section 3 would commence only "on the commencement of a Basic Law which will regulate the conduct of the referendum." Clearly, the Knesset itself was aware of the normative supra-statutory constitutional weight of the adoption of a governmental system, conducted, *inter alia*, by means of a "referendum," and the corresponding need to anchor this system in basic legislation, and not in mere ordinary enactment.

However, and to the contrary, as we have witnessed in 2010, the Knesset enacted the Referendum Law, as an ordinary law, rather than a Basic Law. It was then—as I view it—that the petition before the HCJ and its evolvement during the first two hearing sessions that forced, in 2014, the Knesset to alter its initial ordinary legislation to a Basic Law enactment, as crystalized in the shape of the Referendum Basic Law.

In my opinion, by enlarging the judicial panel and issuing a decree *nisi*, the Court indicated to the Knesset and the Government that it is ready to exert its power of judicial review against the constitutionality of the Referendum Law, thus declaring its form of enactment as unconstitutional.

There cannot be any other explanation to the Knesset's shifting moods other than the one mentioned above. Especially, due to the fact that by legislating the Referendum Basic Law, the Knesset acted contradictory to its official position before the Court, at the time the petition was pending before the Court. If the Knesset was so serious about its arguments, I see no reason why it did not take the legal challenge seriously all the way until the final line, hence, allowing the Court to make its legal and judicial decision on the arguments spread out through the petition.

C. *Referendum and its Impact on the Issue of the Golan Heights*

In this context, it is necessary to briefly examine the Golan Heights Entrenchment Law, if only because of its importance to the issue at hand. The Golan Heights Law, 1981 (Golan Heights Law) was enacted by the Knesset on December 14, 1981, and provided that "The law, jurisdiction

118. *Id.* Judgment of Justice Aharon Barak ¶ 49 (emphasis added).

and administration of the State shall apply to the Golan Heights." The public perceived the law as annexing the Golan Heights and making it part of the territory of the State of Israel. This was also the way the law was referred to by its opponents. However, the Government deliberately avoided using the word "annexation."

The law led to fierce international criticism directed against Israel, and no country in the world, including the United States of America, ever recognized this law. The U.N. Security Council even responded by passing Resolution 497, thus declaring that this "annexation" was "without international legal effect." The practical consequences of this law are few. This is because, since the enactment of the law, many governments in Israel have conducted, overt or covert, political negotiations with Syria; negotiations which reached an advanced stage, and even discussed the return of the Golan Heights, in whole or in part, to Syria.

In 1999, the Knesset passed the Golan Heights Entrenchment Law, according to which a government decision to give up territory of the State would require the approval of a majority of the Knesset members (61 or more) and a majority of the voters in a referendum—this would apply immediately upon the adoption of a Basic Law regulating the same; basic legislation.

In 2010 the Referendum Law was passed, in essence amending the Golan Heights Entrenchment Law, and subordinating the decisions of the executive branch regarding cessation of the application of the law, jurisdiction and administration of the State of Israel to the "territory"—not only to Knesset approval but also to the approval of the People, within the framework of a referendum.[119] The Golan Heights Entrenchment Law was basically amended by the Referendum Law, thus replacing the requirement for the adoption of a referendum mechanism using basic legislation (under the original Golan Heights Entrenchment Law) with the actual adoption of the referendum mechanism through ordinary legislation alone.[120]

A perusal of the provisions of the Referendum Law reveals that it relates to the adoption of a referendum, which binds the legislature and the executive authority; and that as a corollary, in absence of the final and binding seal of approval of the People, no legal or administrative significance attaches to the decisions of these two governmental branches, a seal of approval which may only be obtained through a referendum.

However, it should be noted that in my view the provisions of the

119. The territory to which the law, jurisdiction and administration of the State of Israel applies.

120. *See* RUBINSTEIN & MEDINA, *supra* note 14, at 122.

Referendum Law contain a self-neutralization mechanism. That is because according to this law it will not be necessary to refer to a referendum where the Government's decision is approved by 80 MKs. Namely, the above-mentioned law requires the reference to a referendum only in case the Knesset confirms the Government's decision by votes of 61 MKs. It is remarkable that should the Knesset reject the Government's decision, then no reference to the People is required (*i.e.*, no referendum would be exerted).[121]

The Referendum Law establishes a concrete arrangement for elections to the legislative branch—elections for all intents and purposes—in relation to a specific issue, with all that implies in procedural and substantive terms.

Furthermore, a note shall be made that the Referendum Law lacks constitutional logic insofar as it requires a special majority of 61 MKs in order to refer the Government's decision to exert a referendum, while it finds it sufficient that a simple majority of participants in the referendum confirm the Government's decision. This is being mentioned especially due to the importance of the topic referred to by the referendum. If the issue put forward for the public's decision is so significant, then a special majority should have been sought.

D. *The Referendum Law: Unconstitutional Variation of Basic Legislation*

The Referendum Law embraces a complete basic and fundamental electoral order—which I contend is improper—within the framework of an ordinary law. It does so despite the clear and explicit intention of the Knesset, as revealed in the original version of the Golan Heights Entrenchment Law of 1999, despite the judicial determinations in the *Mizrachi Bank* case,[122] including the subsequent binding rulings of the HCJ, and in spite of the clarity and specificity of Section 4 of Basic Law: The Knesset and Section 44 of Basic Law: The Government, which refer explicitly to the need for Basic Law enactment when seeking to change the electoral system or modify (expand or narrow) the powers of the executive authority.

Above all, and in addition, by reading the latter above-mentioned Basic Laws, it becomes clear that the concept of a referendum is foreign to both of them. It follows, therefore, that in essence, according to its provisions, the Referendum Law limits the powers of the executive authority, including its residual authority in particular, and explicitly alters the system of government and the electoral system in Israel.

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121. Referendum Law, *supra* note 3, § 4(2)(b).

122. *Mizrachi Bank*, CA 6821/93 (Isr.).

To make the argument clearer, time then to emphasize, in further details, how the initial Referendum Law materially changes other constitutional provisions in Basic Law: The Knesset. To elaborate on this point, allow me to provide the following examples:

First, the Referendum Law creates another source of authority for "dissolving" the Knesset, in the sense that it compels an election—albeit in an *ad hoc* manner—including all the procedures involved therein.

Second, the Referendum Law affects the continuity of the term of the Knesset, though Section 8 of Basic Law: The Knesset explicitly provides for a term of four years. Thus, in absence of any of the grounds for shortening the term of the Knesset, as stipulated in Basic Law: The Knesset, there is no statutory ground which would allow even the temporary forfeiture of the Knesset's term of office or the continuity of its decision-making process, for even a single hour. Clearly, there is also no ground, under Basic Law: The Knesset, for allowing a change in the election date as prescribed in Section 9 of Basic Law: The Knesset, including the relevant provisions for early elections or postponed elections.

Third, the Referendum Law materially varies Basic Law: The Knesset with regard to the rights to vote and to be elected.[123] This is because these two rights are not formal in the sense that they allow the implementation of the rights to vote or to be elected. Rather, these are substantive rights, which are realized in accordance with the dates and grounds explicitly stated in Basic Law: The Knesset. In this context, it must be reemphasized that the right to vote and the right to be elected are founded on, and as part of, the complete mechanism of election law established by Basic Law: The Knesset and the Knesset Elections Law (*i.e.*, insofar as these relate to the fulfillment of the right to influence the democratic process), whether as a voter or as a candidate for election. The latter two players, by virtue of the provisions of Basic Law: The Knesset and the Knesset Elections Law, both in relation to the dates for holding elections, and in relation to the grounds on which the term of the elected Knesset may be shortened or extended, have a reliance interest. Basic Law: The Knesset does not contain provisions allowing for the creation of a temporary Knesset convened by the People, which can reach decisions that override the decisions of the existing elected Knesset.

To this extent, it is not constitutionally preferable then for the Knesset to have enacted the Referendum Basic Law; it must have done so from the beginning. This is what Israel's constitutional structure requires. It is not by chance, therefore, that the Knesset enacted the Referendum Basic Law shortly before the third hearing session of the petition before the HCJ.

123. Knesset, *supra* note 51, §§ 5–6.

E. *The Referendum Law and its Impact on Basic Law: Jerusalem, Capital of Israel*

Since 1948, the legal and international status of Jerusalem, and more specifically of East Jerusalem, has been complicated and obscure. According to the U.N. General Assembly's Resolution 181, quoted in the Declaration of Establishment, international territory, which would include Jerusalem, was supposed to have been established. This resolution was not accepted; nonetheless, much of the world continues to see it as reflecting the correct legal position and refers to the legal status of Jerusalem accordingly.

In 1949, the State of Israel declared Jerusalem to be the capital of the State of Israel. Since the Six Day War in 1967, Israel has controlled all the territory of Jerusalem, and on July 30, 1980—when Basic Law: Jerusalem, Capital of Israel was adopted—the entire city of Jerusalem became an integral part of the State of Israel by virtue of Israeli law. In response, on August 20, 1980 the U.N. Security Council adopted Resolution 478 calling for the cancellation of this Basic Law.

Under the Oslo Accords, signed on September 13, 1993, the final status of East Jerusalem would be determined at a later date following negotiations between the State of Israel and the Palestinian Authority.

Apart from being a Basic Law, and as such possesses supra-legal constitutional status, Basic Law: Jerusalem, Capital of Israel, contains a formal entrenchment provision in the form of Section 7, which states: "Clauses 5 and 6 shall not be modified except by a basic law passed by a majority of the members of the Knesset." Sections 5 of the Basic Law states: "The jurisdiction of Jerusalem includes, as pertaining to this Basic Law, among others, all of the area that is described in the appendix of the proclamation expanding the borders of municipal Jerusalem beginning . . . June 28th, 1967, as was given according to the Cities' Ordinance." Section 6 of the Basic Law states: "No authority that is stipulated in the law of the State of Israel or of the Jerusalem Municipality may be transferred either permanently or for an allotted period of time to a foreign body, whether political, governmental or to any other similar type of foreign body." It seems, therefore, that the Referendum Law may have serious legal and constitutional implications regarding the legal status of East Jerusalem, within the framework of a future political settlement with the Palestinian Authority. The legal framework prescribed by the Referendum Law materially changes the provisions of Section 7 of Basic Law: Jerusalem, Capital of Israel, which clearly requires that such a change be made by a Basic Law enactment rather than an ordinary legislation. Therefore, the Knesset had no discretion in choosing between ordinary law and Basic Law legislation. It should have chosen the latter option from the very beginning. Here we are again; it is not out of free

choice that the Knesset ultimately made its mind in enacting the Referendum Basic Law. It was, in my modest view, a direct consequence of the petition and its evolvement before the HCJ.

F. *Interim Conclusion*

In essence, the Referendum Law enables the current parliamentary majority in the Israeli Knesset to misuse its power by fettering the legislature and the executive authority in the future. Fettering that, as mentioned, should be confined to basic legislation and not allowed through ordinary legislation; fettering that has no moral, legal, constitutional or historical justification. This is particularly true in light of the fact that the application of the law, jurisdiction and administration of the State of Israel to the Golan Heights and to East Jerusalem was not made by way of a referendum, and therefore there is no room to revoke the application of law, jurisdiction and administration to these areas by way of a referendum. All this is true, moreover, in view of the historic, political and international—diplomatic and legal—conflict regarding the legal status of the Golan Heights and East Jerusalem.

Thus, the Referendum Law materially changes fundamental provisions in Basic Law: The Knesset, Basic Law: The Government, and Basic Law: Jerusalem, Capital of Israel. The Referendum Law was not initially passed in accordance with the Israeli constitutional structure, namely through basic legislation, and therefore it was a "bad law." Yet, four years after the original enactment of the 2010 law, the Knesset, luckily, regained its composure. However, better late than never. To this extent the Knesset corrected then a fundamental constitutional flaw, that otherwise would have required the intervention of the HCJ—a judicial review that the Knesset succeeded to avoid at the last minute of the judicial hearing before the Court.

The question becomes then: does the latter legislative amendment fully resolve the constitutional flaws in the Referendum Law? In my view, the Referendum Law is substantively flawed as it unlawfully violates fundamental constitutional human rights. Before approaching this issue, a note ought to be made.

The arguments at this level were not discussed before the HCJ, since already in the first hearing session of the petition, and in light of the Court's remarks, I have agreed to limit the scope of the petition, particularly given that no actual referendum was taking place at the time the petition was heard by the Court.

This way or the other, and for the sake of academic research, I would like to provide the readers with my arguments in this context.

G. *The Referendum Law: Unconstitutional Violation of Protected*

Fundamental Rights

The Referendum Law, including the governmental mechanism contained therein, violates protected constitutional rights. These protected fundamental rights include the right to dignity and the right to equality (equality before the law and the principle of substantive equality) under Basic Law: Human Dignity and Liberty,[124] and the right to vote and the right to be elected under Basic Law: The Knesset.[125] These rights are violated by the Referendum Law not in accordance with the terms of the limitation clause set out in Basic Law: Human Dignity and Liberty,[126] and not in accordance with the judicial limitation[127] clause applied in relation to Basic Law: The Knesset.[128]

1. The Right to Vote and the Right to be Elected

According to Section 5 of Basic Law: The Knesset, the right to vote in elections to the Knesset is given to every person who meets the following cumulative criteria: he/she is (a) an Israeli citizen; (b) 18 years old or older; and (c) the court has not deprived him/her of this right by virtue of any law. The right to be elected to the Knesset is given to any person who meets the following cumulative criteria: he/she is (a) an Israeli citizen; (b) included in a list of candidates submitted by a party; and (c) on the date of filing the list of candidates he/she is twenty-one years of age or over.

The election process is not limited to the formal meaning of the process, but has substantive, practical and conceptual implications. These implications relate, *inter alia*, to the Israeli citizens' ability to influence the democratic process, both as voters and as possible candidates for election. A citizen has a reliance interest in relation to the date of holding the election for the Knesset as well as in relation to the full term of the serving Knesset, subject, as noted, to the grounds listed in Basic Law: The Knesset[129] regarding the extension or shortening of the term of the Knesset.

Violations of these rights, according to the mechanism outlined in the Referendum Law,[130] must be carried out in compliance with the constitutional standards set out in the judicial limitation clause, before such violations can be deemed constitutional. In absence of such

124. Human Dignity and Liberty, *supra* note 37, §§ 2 & 4.
125. Knesset, *supra* note 51, §§ 5 & 6.
126. Human Dignity and Liberty, *supra* note 37, § 8.
127. *See supra* note 36.
128. *See supra* note 51.
129. *See id.*
130. The Book of Laws, No. 2263 (Nov. 28, 2010).

compliance, the scourge of unconstitutionality taints these violations. This is especially true in light of the understanding of the referendum mechanism as an apparatus for establishing a temporary superior Knesset (superior to the serving Knesset).

The Referendum Law violates the integrity of the preceding election process by virtue of which the current Knesset serves. It also violates the right to vote and the right to be elected of Israeli citizens who wish to participate in the decision-making process on crucial matters in an organized and established manner, within the framework of the classical procedure of elections to the Knesset—the manner prescribed in Basic Law: The Knesset.[131]

Moreover, the right to vote and the right to be elected are derived from the representative electoral system used in Israel, both by virtue of Basic Law: The Knesset and the Knesset Elections Law.[132]

This broad and substantive understanding of the two rights support a perception of the governmental process as a representative process, which encompasses decisions based on balances rather than on dichotomies. In contrast, the Referendum Law actually adopts a dichotomous approach of "yes or no" and "for or against." The latter approach is foreign to the Israeli electoral system and, as such, violates the right to vote and the right to be elected.

2. The Arab Minority in Israel: The Right to Dignity, the Right to Equality, and the Referendum Law[133]

Another aspect of the violation of the right to vote and the right to be elected relates to the collective rights of the Arab minority in Israel, especially, but not only, the residents of the Golan Heights and East Jerusalem.

The Referendum Law entrenches the Arab collective's status as a minority in the State of Israel and, as a result, sweepingly, technically and formally prevents the Arab citizens from engaging in genuine and influential participation in the electoral process, either as voters or as candidates for election. This is because a national ethnic minority is best able to exert its influence in a representative democracy by allowing the public's representatives to show the necessary flexibility and discretion to engage in political and principled compromises. In other words, flexibility that allows the management of a constitutional democratic society (substantive democracy), and that which rejects the validity of a formal numerical democracy.

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131. *See supra* note 51.

132. The Book of Laws, No. 556 (Apr. 14, 1969).

133. *See generally* Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN.; J. URB. & CONTEMP. L. 135 (1981).

The Referendum Law creates a regime of formal democracy, which implements the rights of the Arab minority in Israel to vote and be elected in a completely technical manner, but does not grant this minority a genuine opportunity to influence the election process. This is because the Referendum Law creates a regime of "yes or no," that negates the possibility of compromises and balances. In essence, the Referendum Law perpetuates the numerical inferiority of the Arab minority in Israel, and creates serious concern that the formal power of the referendum may be abused. This should not be the way of substantive democracy. Substantive democracy protects the rights of minorities and prevents abuse on their part.

The Referendum Law significantly erodes the ability of the Arab minority in Israel to exert real and representative influence—enabling balances and compromises—in the political process, including the political decision-making process in Israel. Thus, the Referendum Law violates the right of the Arab minority in Israel to formal and substantive equality relative to the Jewish citizens of Israel. The Arab Minority's right to equality is violated by the Referendum Law's attitude toward the Arab minority, which fosters a means to achieve another purpose—the nature of which will be examined below. Regardless of how greatly this purpose may be justified, the very use of the Arab minority as a means, based on its ethnic national character, is humiliating and degrading, and consequently breaches the dignity of the Arab minority.

Nevertheless, and above all, the Referendum Law is nothing but a story of irony, for it aims at determining the future of the residents of East Jerusalem and the Golan Heights, by a referendum, in which these residents are not allowed to participate in, for they are not allowed, in the first place, to take part in the elections to the Knesset—neither as voters nor as candidates.

3. The Referendum Law and the Constitutionality of the Violation of Human Rights: Analysis of the Terms of the Limitation Clause

When a petitioner challenges the constitutionality of a statue, the government bears the burden of establishing that the statute is constitutional under the limitation clause.[134] Nonetheless, I shall refer to

134. Compare the debate on this issue: *See* (1) AHARON BARAK, PROPORTIONALITY IN LAW, VIOLATION OF THE CONSTITUTIONAL RIGHT AND ITS LIMITATIONS 529–31 (2010) (in Hebrew); (2) HCJ 6055/95 Zemach v. Minister of Def. 53(5) PD 241, at 269 [1999] (Isr.); (3) HCJ 8150/98 Jerusalem Arts Theater v. Minister of Labour 54(4) PD 443, at 445 (Isr.); (4) HCJ 366/03 Commitment to Peace & Soc. Justice Movement v. Minister of Fin. 60(3) PD 464 (Isr.); (5) HCJ 8035/07 Eliahu v. Gov't of Israel [2008] (Isr.) (Published in Nevo on Mar. 21, 2008); (6) HCJ 124/09 Dawiyat v. Minister of Def. [2009] (Isr.) (Published in Nevo on Mar. 18, 2009); (7) HCJ 1993/03 Movement for Quality in Gov't v. Prime Minister, 57(6) PD 817 [2003] (Isr.).

the requirements of the limitation clause, including the subtests of the requirement of proportionality contained in that clause.

A constitutional democracy is characterized by the fact that it is not sufficient for lawful consent to be given to a violation of a constitutional right. Legality is insufficient. The violation of a constitutional right must be supported by a material and legitimate justification. An element of legitimacy is required. One characteristic of this explicit requirement is a worthy goal; another is that the means used to achieve that goal do not impair the constitutional right beyond a proper extent.

Constitutional rights are so unique, *inter alia*, for it may only be violated for the attainment of objectives, which can morally justify a violation of the constitutional right. Such an objective is derived from the values on which society is based (*i.e.*, democratic values in a constitutional democracy,[135] and in the State of Israel, as a Jewish and democratic state,[136] these are its values).

The *Mizrachi Bank* case considered the general standard applied in Israeli law when determining whether the purpose under consideration is proper or not: "the purpose fits if it is intended to fulfill important social goals for the establishment of a social framework that recognizes the constitutional importance of human rights and the need to protect them."[137] It was further held in that case that:[138]

> a purpose that is positive from the point of view of human rights and the values of society, including the purpose of establishing a reasonable and fair balance between the rights of different People who hold interests that are sometimes inconsistent with each other. A proper purpose is one that creates a foundation for living together, even if it entails a compromise in the area of granting optimal rights to each and every individual, or if it serves interests that are essential to the preservation of the state and society.

The declared subjective purpose, and indeed the objective and implied purpose, of the Referendum Law is to subordinate government decisions not only to the approval of the Knesset but also to the approval of the People, insofar as the decisions concern the application of the law, jurisdiction and administration of the State of Israel to certain areas, such as the Golan Heights and East Jerusalem.

As legitimate as this purpose can be, it is, in my view, improper. It undermines the validity of the election to the Knesset as a result of which the current Knesset serves, and violates the right to vote and the right to

135. SAADIA & ORGAD, *supra* note 18, at 125.

136. BARAK, *supra* note 114, at 295.

137. *Mizrachi Bank*, CA 6821/93; Judgment of Justice Aharon Barak, at 435.

138. *Id.*, Judgment of Chief Justice Meir Shamgar, at 342.

be elected of Israeli citizens who wish to take part in the critical decision-making process in the established classical election process, namely, elections held in accordance with the constitutional criteria set out in Basic Law: The Knesset and the Knesset Elections Law.

Political compromise is a preferable way to make decisions on complex and weighty issues such as the borders of the State, national identity and constitutional rules. In contrast to compromise, a referendum fosters the illusion that there is a kind of legitimate political knife that cuts one way or another. Consideration of problems in this 'black and white' way, confronting "justice" with "injustice" or "truth" with "lies," in terms of the majority versus the minority, is foreign to the spirit of democracy, and *a fortiori*, liberal democracy.[139]

Moreover, where issues are complex from a legal, national and international point of view, such as that relating to the Golan Heights and East Jerusalem, it would seem that using the device of a referendum would only deepen the existing chasms in society in general, and on this specific issue, in particular, rather than bridge them.

The mechanism of the referendum results in substantive controversial issues being decided with finality, in a manner that undermines social and public stability and impairs social cohesion. This is particularly relevant in the case of the State of Israel, which is divided, and where often the absence of decisions on these substantive, complex and sensitive issues is the key to the development of a political dialogue that allows balanced and considered political decisions to be made.

Over the years, the HCJ has pursued a consistent policy of refraining from ruling on the legal status of the Golan Heights—the essence of the Referendum Law—leaving this issue open, as far as possible, to the interpretation of the relevant national and international decision makers.[140] In this context, it is worth quoting the words of Justice Aharon Barak, in the *Abu Salah* case:

> By virtue of the Golan Heights Law all the legal norms applicable in the country are applied to the Golan Heights, in such manner that where, in any statute, the words "Israel" or the "State" or the "State of Israel," are used the Golan Heights shall also be implied . . . there is no doubt that the purpose of the legislation – and the language of the provision – is to equate the Golan Heights, with regard to law, jurisdiction, and administration, to the State of Israel itself.[141]

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139. Yaron Ezrachi, *Arguments against the Use of a Referendum in the Israeli Democracy*, *in* DANA ARIELI-HOROWITZ, REFERENDA IN ISRAEL 59 (1993) (in Hebrew).

140. SAADIA & ORGAD, *supra* note 18, at 291.

141. HCJ 205/82 Abu Salah v. Minister of Interior 37(2) PD 718, at 720–21 (Isr.).

In a young and inexperienced democracy, such as that of the State of Israel, we must avoid creating centers of authority outside the institutions of the legislative, executive and judicial branches, and the political framework of the parties. Such centers of authority may tempt irresponsible political entities to harm the status of the legislature or the government, in a manner that endangers the accepted democratic political processes. A referendum can undermine the political stability of the democratic system rather than strengthen it.

Moreover, the purpose of the Referendum Law negates the possibility of creating potential critical balances that are needed in order to deem the law's purpose as worthy. Democracy, particularly of the liberal kind, is not based only on the principles of the People's sovereignty and majority rule. A democratic regime also includes principles of pluralism, protection of minority rights, consensus and compromise. Naturally, we must accept the view that decisions in a democracy should be made by "a government consisting of representatives," both in view of the size of modern democratic societies and because of the complex nature of the issues that demand resolution. This is also the case in Israel.

From this perspective, the referendum comes across as a populist device, which may not only undermine representative democracy and its institutions, but also divide the complex fabric of Israel's democratic and multi-cultural society.[142] The society in the State of Israel is subject to conflict between the Jewish majority and the Arab minority. In this situation, a referendum—cutting across and dividing the majority from the minority based on national identity—is dangerous to society and to the democratic state. This situation encourages the use of the referendum as a means for conducting narrow nationalist policies under the guise of democracy.

Even if I assume that the violation of fundamental rights is made for a proper purpose, in accordance with the values of the State of Israel as a Jewish and democratic state, I must still consider the proportionality of the violation. If the harm is disproportionate, the Referendum Law is, a priori, unconstitutional.

The requirement for proportionality consists of three subtests: (a) the rational connection test: the existence of a rational connection between the means chosen and the purpose that the legislature seeks to achieve through this measure; (b) the necessity test: the existence of a means which causes the least harm to the protected basic right; and (c) the test of proportionality in the narrow sense: balancing benefits.

Even if I assume that there is a rational connection between the means

142. Dana Blander & Gideon Rahat, *Referendum: Myth and Reality* (position paper of the Israel Democracy Institute) (vol. 20) 55 (2000) (in Hebrew).

(the Referendum Law) and the purpose for which this law was enacted,[143] the means that was selected is not the least drastic in terms of the violation of the protected fundamental rights in question. An alternative means was available, namely, early elections in accordance with the rules of Basic Law: the Knesset and the Knesset Elections Law.[144]

It should be emphasized that underlying the necessity test is the concept that legislative measures are needed only if it is not possible to achieve the legislative objective by other hypothetical means that comply with the requirement of a rational connection with equal or greater intensity, and which may cause a lesser harm to the constitutional rights.[145]

Further, even if one assumes that the Referendum Law is a less harmful measure, a balance must still be drawn between the benefits ensuing from the implementation of the purpose and the resulting harm to the constitutional right.[146] This is because the measure established by the law must create a proper relationship between the benefit gained from, and the scope of the harm to the constitutional human right.[147]

In light of the broader above detailed considerations, militating against the institution of the referendum, the harm to protected constitutional rights resulting from the operation of the mechanisms under the Referendum Law far exceeds the practical usefulness in complying with this law.

IV. INSTEAD OF A CONCLUSION: THE REFERENDUM LAW IN PERSPECTIVE

"Incidentally, in this context there are those who believe that it would be inappropriate to hand over certain issues to the general public for decision – unlike general decisions, such as the adoption of a constitution – by way of a referendum."[148] The electoral system in Israel is a democratic parliamentary system of representative government.[149] Thus, according to constitutional legal norms prescribed in this context, as the People do not have power to decide issues on the agenda of the executive or legislative branch through a referendum.

In other words, the People do not have a right to engage in a

143. *See generally* BARAK, *supra* note 110, at 289–388.

144. The Book of Laws, no. 556 (Apr. 14, 1969).

145. HCJ 8276/05 Adala—The Legal Ctr. for Arab Minority Rights v. Minister of Def. (published in Nevo, on Dec. 12, 2006) (Isr.); Judgment of Chief Justice Aharon Barak ¶ 12.

146. *See* BARAK, *supra* note 110, at 419–21. For the general proposition that when deciding domestic issues, judges should balance the public interest and individual human rights.

147. HCJ 1030/99 Oron v. Speaker of the Knesset 56(3) PD 640, at 668 (Isr.).

148. RUBINSTEIN & MEDINA, *supra* note 14, at 163–64.

149. *See* Knesset, *supra* note 51, § 4.

"referendum," and in any event the Knesset does not have a mandate to pass legislation providing for formal entrenchment which is reflected in the existence of a referendum. Only the Knesset, as a constitutive, and not as a legislative body, is competent to change the electoral system and not the People through the device of a referendum. Put differently, it is not possible to vary Basic Law: The Knesset indirectly by means of referenda[150] as, according to the language of Section 4 of Basic Law: The Knesset, it is not possible to hold referenda to change the electoral system.

To this extent, the Knesset's ultimate decision, in 2014, to incorporate the referendum's concept in a Basic Law was not out of generosity, nor was it because the Knesset finally got convinced that this is the only right way to properly act, but rather because the HCJ gave enough bold hints,[151] during the hearing sessions of the petition before it, that as it stood then, and in the absence of a Basic Law legislature, a constitutional problem calls upon judicial review. This becomes evident by the decision to enlarge the judicial panel, sitting in the petition, to seven judges, already after the first hearing session, as well as to issue a decree *nisi*.[152]

The Referendum Law materially modifies the system of government of the State of Israel, and as a corollary materially modifies Basic Law: The Knesset, Basic Law: The Government, and Basic Law: Jerusalem, Capital of Israel. It does so by significantly eroding the foundations of the powers of the Knesset as the sole legislature of the State of Israel, as well as, *inter alia*, the residual authority of the executive branch. As explained, such modifications can only be performed by means of basic legislation.[153]

This way or the other, in a democratic regime premised on the principle of the separation of powers, where the political authority is empowered to determine policy and the implementation of its policy in the political, military, economic, and social arenas, it is of paramount importance to preserve the power and status of the political authority. The creation and modification of the political culture should be, first and foremost, the province of the political forces themselves.

Even if the Knesset would have had a mandate to adopt basic legislation enabling formal entrenchment expressed through the holding of a referendum—as it ultimately did in 2014—such power would be limited if abused.[154] The application of the law, jurisdiction, and administration of the State of Israel to the Golan Heights and East Jerusalem was not made by way of a referendum and therefore should not

150. SAADIA & ORGAD, *supra* note 18, at 147.

151. *See supra* note 4.

152. *Id.*

153. *See Mizrachi Bank*, CA 6821/93.

154. RUBINSTEIN & MEDINA, *supra* note 14, at 122.

be annulled by way of a referendum. The existence of the historic, political, international, diplomatic, and legal dispute in relation to the Golan Heights and East Jerusalem support this view.

The Referendum Law strikes a mortal blow to the principle of the rule of law, both formal and substantive. The rule of law is the foundation upon which the Basic Laws of the State of Israel rest; particularly those dealing with the establishment of its parliamentary, executive, and judicial regime.

In light of the delicate constitutional fabric of the State of Israel, the institution of the referendum can be a valid and legitimate solution only in relation to the question of the need for the establishment of a formal written and orderly constitution for the State of Israel.

Either way, a constitutional legislation that incorporates the idea of referendum as a binding tool does not cure the constitutional deficiencies of such legislation. This is because it violates fundamental constitutional rights, in general, and others of the Arab minority in Israel, in particular. These rights concern the right to vote and the right to be elected, and the right to dignity and the right to equality with regard to the rights to vote and be elected. Worse, the Referendum Law ignores the constitutional rights of Israel's Arab residents of East Jerusalem and the Golan Heights. They are not full citizens of Israel but only permanent residents and, as such, they have no right to vote, neither for the Knesset nor in a referendum. This is an awkward legal and constitutional situation, especially given that the Referendum Law primarily affects them.

I am aware that even constitutional rights are not absolute, and that as such they can be violated by the governmental branches. However, when this happens, such violation must meet the requirements set forth by the formula as drafted in the limitation clause of Basic Law: Human Dignity and Liberty. This has not been the case for the Referendum Law. Therefore, the Referendum Law is unconstitutional, because it is completely contrary to written and unwritten binding supra-legal constitutional norms as well as to legal rulings possessing a supra-legal constitutional nature.

Finally, it is valuable to quote the remarks of the founder of the political vision of the State of Israel, Theodor Herzl, in his work "*The Jewish State*":

> [A] settling of questions by the referendum to be an unsatisfactory procedure, because there are no simple political questions which can be answered merely by Yes and No. The masses are also more prone, even than Parliaments, to be led away by heterodox opinions and to be swayed by vigorous ranting. It is impossible to formulate a wise internal or external policy in a popular

assembly.[155]

155. THEODORE HERZL, THE JEWISH STATE, ch. 5 (1896) (trans. Jewish Virtual Library).